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6 UNITED STATES DISTRICT COURT
7 WESTERN DISTRICT OF WASHINGTON
8 AT SEATTLE

9 ANTHONY EUGENE LEWIS,

10 Plaintiff,

11 v.

12 KING COUNTY DEPARTMENT OF RISK
13 MANAGEMENT DIVISION, et al.,

14 Defendants.

Case No. C18-1798-RSM-JPD

REPORT AND RECOMMENDATION

15 I. INTRODUCTION

16 Plaintiff, who is currently incarcerated at the King County Jail, is proceeding *pro se* and
17 *in forma pauperis* in this 42 U.S.C. § 1983 civil rights action against King County. Plaintiff's
18 original complaint was deficient, and the Court granted him leave to amend. Because plaintiff's
19 amended complaint is also deficient and further amendments would be futile, the Court
20 recommends that plaintiff's amended complaint and this action be DISMISSED with prejudice
21 and without leave to amend. The Court further recommends that this dismissal count as a
22 STRIKE under 28 U.S.C. § 1915(g) (prisoner may not proceed *in forma pauperis* if prisoner has,
23 on three or more prior occasions while incarcerated, brought an action or appeal that was

1 dismissed a frivolous, malicious, or for failure to state a claim, unless the prisoner is under
2 imminent danger of serious physical injury).

3 II. BACKGROUND

4 Plaintiff filed his original complaint against the King County Department of Risk
5 Management and the King County Sheriff's Homeless Sex Offender Registration Office. *See*
6 Dkt. 6. His claims were not entirely clear, but it appeared that he was complaining about his
7 duty to register as a sex offender and alleging that due process requires review of a claim for
8 damages he filed against King County. He also alleged that on October 25, 2018, an employee at
9 the King County Sheriff's Homeless Sex Offender Registration Office sexually harassed him by
10 "poking his tongue in [his] cheek out at Plaintiff."

11 The Court declined to serve his complaint and granted leave to amend. Dkt. 7. The
12 Court explained the standard under which it screens complaints and the legal standard for § 1983
13 claims. The Court explained that plaintiff failed to name a proper defendant but that he could
14 bring a claim against King County if he could allege a municipal "custom" or "policy" that cause
15 his injury. The Court also found that even if plaintiff had named a proper defendant, his
16 remaining allegations failed to state a claim upon which relief may be granted. First, plaintiff
17 had already lost a lawsuit filed in this district challenging Washington's sex offender registration
18 requirements under the Eighth and Fourteenth Amendments. *Lewis v. King County*, No. 16-
19 1112-JLR, 2017 WL 2570769 (W.D. Wash. June 14, 2017), *affirmed*, 708 Fed. Appx. 432 (9th
20 Cir. 2017) (unpublished). Second, plaintiff failed to allege a basis for a due process claim related
21 to King County's handling of his claim for damages. Finally, the alleged sexual harassment did
22 not amount to a constitutional violation. *See Austin v. Terhune*, 367 F.3d 1167, 1171-72 (9th Cir.
23 2004) (upholding dismissal of sexual harassment claim as "not sufficiently serious" because the

1 guard was behind a glass-enclosed control booth when he exposed his penis and made lewd
2 comments, never touched the inmate, and the isolated incident lasted only 30-40 seconds).

3 Plaintiff timely filed an amended complaint against King County. Dkt. 8. Although it is
4 somewhat difficult to understand, he appears to make the same allegations regarding the duty to
5 register as a sex offender, the claim for damages he filed against King County, and the alleged
6 sexual harassment at the Homeless Sex Offender Registration Office. *See id.* at 3-5. He also
7 alleges that since he was arrested and booked into jail on October 31, 2018, he has been suffering
8 ongoing “astro sexual assault.” *Id.* at 5-6. He complains that one night he had to sleep on a cold
9 metal bed and also that his kites and grievances regarding the “astro sexual assault” have not
10 been answered. *Id.* He seeks injunctive and monetary relief. *Id.* at 8.

11 III. DISCUSSION

12 A. Section 1915 Screening Standard

13 Once a complaint is filed *in forma pauperis*, the Court must dismiss it prior to service if it
14 “fails to state a claim on which relief can be granted.” 28 U.S.C. § 1915(e)(2)(b)(ii). To avoid
15 dismissal, a complaint must contain sufficient factual matter, accepted as true, to state a claim to
16 relief that is plausible on its face. *Ashcroft v. Iqbal*, 556 U.S. 662, 664 (2009). The factual
17 allegations must be “enough to raise a right to relief above the speculative level.” *Bell Atlantic*
18 *Corp. v. Twombly*, 550 U.S. 544, 555 (2007). The complaint may be dismissed if it lacks a
19 cognizable legal theory or states insufficient facts to support a cognizable legal theory. *Zixiang*
20 *v. Kerry*, 710 F.3d 995, 999 (9th Cir. 2013).

21 The Court holds *pro se* plaintiffs to less stringent pleading standards than represented
22 plaintiffs and liberally construes a *pro se* complaint in the light most favorable to the plaintiff.
23 *Erickson v. Pardus*, 551 U.S. 89, 93 (2007). Nevertheless, § 1915(e) “not only permits but

1 requires a district court to dismiss an in forma pauperis complaint that fails to state a claim.”
2 *Lopez v. Smith*, 203 F.3d 1122, 1229 (9th Cir. 2000) (en banc). When dismissing a complaint
3 under § 1915(e), the Court gives *pro se* plaintiffs leave to amend unless “it is absolutely clear
4 that the deficiencies of the complaint could not be cured by amendment.” *Cato v. United States*,
5 70 F.3d 1103, 1106 (9th Cir. 1995).

6 B. Section 1983 legal standard

7 To sustain a § 1983 civil rights claim, plaintiff must show (1) he suffered a violation of
8 rights protected by the Constitution or created by federal statute, and (2) the violation was
9 proximately caused by a person acting under color of state or federal law. *West v. Atkins*, 487
10 U.S. 42, 48 (1988); *Crumpton v. Gates*, 947 F.2d 1418, 1420 (9th Cir. 1991). To satisfy the
11 second prong, plaintiff must allege facts showing how individually named defendants caused or
12 personally participated in causing the harm alleged in the complaint. *Arnold v. IBM*, 637 F.2d
13 1350, 1355 (9th Cir. 1981). A plaintiff may not hold supervisory personnel liable under § 1983
14 for constitutional deprivations under a theory of supervisory liability. *Taylor v. List*, 880 F.2d
15 1040, 1045 (9th Cir. 1989).

16 A local government unit or municipality can be sued as a “person” under § 1983. *Monell*
17 *v. Dep’t of Soc. Servs. of City of New York*, 436 U.S. 658, 691-94 (1978). However, a
18 municipality cannot be held liable under § 1983 solely because it employs a tortfeasor. *Id.* A
19 plaintiff seeking to impose liability on a municipality under § 1983 must identify a municipal
20 “policy” or “custom” that caused his or her injury. *Bd. of the Cnty. Comm’rs of Bryant Cnty. v.*
21 *Brown*, 520 U.S. 397, 403 (1997) (citing *Monell*, 436 U.S. at 694).

1 C. Plaintiff fails to state a claim upon which relief may be granted

2 Plaintiff's amended complaint is deficient for the following reasons. First, plaintiff has
3 already lost a lawsuit filed in this district challenging Washington's sex offender registration
4 requirements under the Eighth and Fourteenth Amendments. *Lewis v. King County*, No. 16-
5 1112-JLR, 2017 WL 2570769 (W.D. Wash. June 14, 2017), *affirmed*, 708 Fed. Appx. 432 (9th
6 Cir. 2017) (unpublished). He cannot relitigate those claims here.

7 Second, plaintiff fails to allege any basis for a due process claim related to King County's
8 handling of his claim for damages.

9 Third, the alleged sexual harassment, including the "astro sexual harassment," does not
10 amount to a constitutional violation. *See Austin v. Terhune*, 367 F.3d 1167, 1171-72 (9th Cir.
11 2004) (upholding dismissal of sexual harassment claim as "not sufficiently serious" because the
12 guard was behind a glass-enclosed control booth when he exposed his penis and made lewd
13 comments, never touched the inmate, and the isolated incident lasted only 30-40 seconds).

14 Fourth, the alleged night of sleeping on a metal bed does not amount to punishment in
15 violation of the Fourteenth Amendment. *See Bell v. Wolfish*, 441 U.S. 520, 535 (1979)
16 ("[U]nder the Due Process Clause, a detainee may not be punished prior to an adjudication of
17 guilt in accordance with due process of law."). The test for identifying unconstitutional
18 punishment at the pretrial stage of a criminal proceeding requires a court to examine "whether
19 there was an express intent to punish, or 'whether an alternative purpose to which [the
20 restriction] may rationally be connected is assignable for it, and whether it appears excessive in
21 relation to the alternative purposes assigned [to it].'" *Demery v. Arpaio*, 378 F.3d 1020, 1028
22 (9th Cir. 2004) (quoting *Bell*, 441 U.S. at 538). "For a particular governmental action to
23 constitute punishment, (1) that action must cause the detainee to suffer some harm or 'disability,'

1 and (2) the purpose of the governmental action must be to punish the detainee.” *Id.* at 1029.
2 Further, “to constitute punishment, the harm or disability caused by the government’s action
3 must either significantly exceed, or be independent of, the inherent discomforts of confinement.”
4 *Id.* at 1030. The discomfort of having to sleep on a metal bed for one night does not significantly
5 exceed the inherent discomforts of confinement.

6 Finally, to the extent plaintiff complains about the jail’s failure to respond to his kites and
7 grievances regarding “astro sexual assault,” he fails to state a claim upon which relief may be
8 granted. Prisoners do not have a standalone due process right to a particular administrative
9 grievance process. *Mann v. Adams*, 855 F.2d 639, 640 (9th Cir. 1988); *Ramirez v. Galaza*, 334
10 F.3d 850, 860 (9th Cir. 2003); *Allen v. Wood*, 970 F. Supp. 824, 832 (E.D. Wash. 1997); *Stewart*
11 *v. Block*, 938 F. Supp. 582, 588 (C.D. Cal. 1996).

12 For these reasons, plaintiff fails to state a claim upon which relief may be granted.

13 IV. CONCLUSION

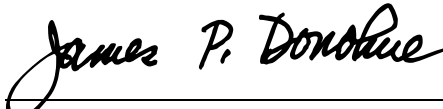
14 As the Court has already granted plaintiff leave to amend, it appears that further
15 amendment would be futile. Accordingly, the Court recommends that plaintiff’s amended
16 complaint and this action be DISMISSED with prejudice and without leave to amend. The Court
17 further recommends that this dismissal count as a STRIKE under 28 U.S.C. § 1915(g) (prisoner
18 may not proceed in forma pauperis if prisoner has, on three or more prior occasions while
19 incarcerated, brought an action or appeal that was dismissed a frivolous, malicious, or for failure
20 to state a claim, unless the prisoner is under imminent danger of serious physical injury). A
21 proposed order accompanies this Report and Recommendation.

22 Objections to this Report and Recommendation, if any, should be filed with the Clerk and
23 served upon all parties to this suit by no later than **February 14, 2019**. Failure to file objections

1 within the specified time may affect your right to appeal. Objections should be noted for
2 consideration on the District Judge's motion calendar for the third Friday after they are filed.
3 Responses to objections may be filed within **fourteen (14)** days after service of objections. If no
4 timely objections are filed, the matter will be ready for consideration by the District Judge on
5 **February 15, 2019.**

6 This Report and Recommendation is not an appealable order. Thus, a notice of appeal
7 seeking review in the Court of Appeals for the Ninth Circuit should not be filed until the
8 assigned District Judge acts on this Report and Recommendation.

9 Dated this 24th day of January, 2019.

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12 JAMES P. DONOHUE
13 United States Magistrate Judge
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